THE RECORD
OF THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

EDITORIAL BOARD

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THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 15 | APRIL 1960 | *Number* 4

Association Activities

AT A special meeting held on March 2, 1960, the following resolution was adopted by a vote of 800 to 34:

> RESOLVED, that when the Committee on Criminal Courts, Law and Procedure, in January 1960, responded to the Mayor's request for its confidential opinion concerning the qualifications of Judge Robert F. Mahoney for reappointment to the Magistrate's Court, the Committee's procedures and action were in conformity with its powers and duties under the Constitution and By-laws of the Association, and the action taken by the Committee is confirmed.

AT THE Stated Meeting on March 8, William C. Chanler, Chairman of the Special Committee on the Administration of Justice, reported on the present status of legislation affecting court reorganization and stated that the Association continued to support the Erwin-Lounsberry bills as amended. The Chairman of the Committee on Corporate Law, Chester Rohrlich, made an interim report on the proposed reorganization of the corporation law of the State of New York, and Henry Harfield, Chairman of

the Special Committee on Banking Law, reported on the work of his Committee.

Following the buffet supper, a symposium was presented by the Committee on Medical Jurisprudence, Morris Ploscowe, Chairman. A panel led a discussion on "Law, Social Change and the Sexual Psychopath." Members of the panel and their subjects were: Dr. Manfred S. Guttmacher, Chief Medical Officer, Supreme Bench of Baltimore City and author of *Sex Offenses*–"Mental Aberration and Sexual Crime"; Professor Louis B. Schwartz, University of Pennsylvania Law School and Associate Reporter American Law Institute Model Penal Code–"Proposals on Sex Crime in the Model Penal Code of The American Law Institute"; and Morris Ploscowe "Social Change and the Law of Sex Crime."

J. ANTHONY PANUCH, recently designated to prepare a report to the Mayor on Urban Renewal, and Bernard Richland, counsel to Mr. Panuch, were guests of the Committee on Real Property Law, Mendes Hershman, Chairman. The topic for discussion was the content of Mr. Panuch's forthcoming report.

THE FOLLOWING editorials appeared in The New York Times for March 4, 1960:

The Bar and the Judge

Mayor Wagner's decision to withhold reappointment of Robert F. Mahoney as a City Magistrate after a score of years on the bench has been supported by an unusual membership meeting of The Association of the Bar of the City of New York. Of 800 persons present only about thirty or so supported reappointment. Thus the membership's endorsement of a committee report declaring Mr. Mahoney not qualified for another term was almost unanimous. While there was no reflection on the Magistrate's integrity, Arthur H. Christy, chairman of the association's criminal courts committee, reported that one reason for rejection was his "intemperate way of handling defendants and lawyers."

Responsible and respected members of the bar are the best judges of the fitness of a man to sit on the bench. They are the most competent to evaluate his record of service. While it is natural that there should be, among lawyers, a difference of opinion as to a judge, the decision as to Mr. Mahoney and

the membership's support of the confidential basis of reporting to the appointing power were so emphatic as to be convincingly conclusive.

We hope this action encourages more courageous, decisive, discriminating action by bar associations throughout the city in advising on the fitness of candidates for the bench. In this respect the City Bar Association has set a fine example through the years.

Conflict-of-Interest

Millard Fillmore was President of the United States when the first general conflict-of-interest law was passed in 1853. Since then a half-dozen other statutes in this field have been adopted from time to time—mostly in the Civil War period—with the result that today the law governing relations of Federal employes and private businesses is hopelessly haphazard and out-of-date. A report that has just been issued by a committee of distinguished lawyers for the Association of the Bar of the City of New York calls the existing conflict-of-interest legislation governing employes of the Executive Branch "inconsistent, overlapping, vague, unreasonably complicated," besides all of which it does "not meet current needs."

The bar association study, financed by the Ford Foundation, offers proposals for a unified, coherent conflict-of-interest statute that would cover modern conditions of government and business, close the many gaps in present law and also ease some of the antiquated and inappropriate regulations that now make it so difficult to obtain top-ranking personnel from the business and professional world.

For instance, the proposed law would specifically prohibit receipt of gifts "from anyone whom the employe has reason to believe would not give the gift but for the employe's office or position with the Government" or from anyone doing business with the employe's agency. Such matters are either covered not at all, or merely by administrative regulations instead of law. The measure would, on the other hand, differentiate where it was reasonable to do so in the restrictions governing permanent employes and those called into Federal service on temporary or "intermittent" duty.

While no report and no law can legislate morality, a clarification and modernization of the statutes can do much to set a pattern of conduct for Federal employes and private business men. Even more can be done by effective leadership of the President; and the report's allusion is clear in the suggestion that the best practice regarding valuable Presidential gifts is to pass them on "to charity or to the national museums."

In considering the proposed legislation stemming out of the report, which has already been introduced by Senators Javits and Keating and Representative Lindsay of New York, Congress would do well to extend its own inquiry to conflict of interest in other parts of the Federal Government, notably the conflict of interest that frequently affects members of Congress itself.

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MAGISTRATES James E. LoPiccolo, Frederick L. Strong and Morton R. Tolleris were guests of the Committee on Legal Aid, Peter

M. Ward, Chairman. The Magistrates discussed with the Committee the problem of the legal representation of indigent defendants in their court.

COMMISSIONER T. T. Wiley of the New York City Traffic Commission was the guest of the Committee on Municipal Affairs, Joseph D. McGoldrick, Chairman. Commissioner Wiley discussed with the Committee problems relating to safety and parking.

THE FOLLOWING Sections of the Committee on Post-Admission Legal Education, Eli Whitney Debevoise, Chairman, have held meetings recently:

The Section on Banking, Corporation and Business Law, John R. Raben, Chairman, sponsored a discussion of "Securities Trading and Fee Sharing Under Chapter X of the Bankruptcy Act." The speaker was Richard V. Bandler, Chief of Branch of Reorganization, New York Regional Office, Securities and Exchange Commission.

The Section on Trade Regulation, Edward L. Rea, Chairman, and the Section on Corporate Law Departments, Otto Kinzel, Chairman, sponsored a joint discussion on "Can Antitrust Curb Union Power?" Speakers were Sylvester Petro, Professor of Law, New York University School of Law, and Raymond S. Smethurst of the Washington, D. C. Bar.

The last of three discussions on "Contested Probate Proceedings" was held by the Section on Wills, Trusts and Estates, Joel Irving Friedman, Chairman. Messrs. Joseph T. Arenson, William T. Collins, II and James L. Murray have been conducting these meetings.

A FORUM on Space Law, sponsored by the Committee on Aeronautics, Leander I. Shelley, Chairman, was held on March 24. The Chairman of the Forum was Richard B. Smith. Speakers were: Dr. Lloyd V. Berkner, Chairman of Space Science Board of

National Academy of Sciences, Past President of International Council of Scientific Unions (body responsible for having arranged the IGY), President of International Scientific Radio Union, President of American Geophysical Union, author of "Science and Foreign Relations," President of Associated Universities; John A. Johnson, General Counsel of National Aeronautics and Space Administration (recently created civilian agency in charge of United States space program), Chairman of NASA Committee on Long-Range Studies; Major General Don R. Ostrander, USAF, Director for Launch Vehicle Programs NASA, formerly Deputy Director of Advanced Research Projects Agency of Department of Defense, Missiles Advisor to NATO International Staff, Deputy Commander for Resources of Air Force Air Research and Development Command, Commander of Holloman Air Development Center at White Sands Proving Ground; Philip C. Jessup, Professor of International Law and Diplomacy at Columbia University, former Ambassador-at-Large for U.S.A., author of numerous books on international law, including "Controls for Outer Space and the Antarctic Analogy."

THE LAW SCHOOL of the University of Michigan will hold a special summer school for lawyers from June 20 to July 1, 1960. Courses will be offered in European Business Operation, Modern Procedural Developments, Current Problems in Constitutional Law, Aspects of Marketing Policies and Practices, Estate Planning, Problems of Evidence and Proof, and Labor Agreements. The charge for the program is $175. Application should be made to the Dean of the Law School.

THE FIFTEENTH annual Art Show will open on April 26 at 4:30 p.m. Mr. Lloyd Goodrich, Director of the Whitney Museum of American Art, is consultant to the Art Committee of which Edmund T. Delaney is Chairman and Samuel Ross Ballin is Chairman of the Art Exhibition.

The Calendar of the Association for April and May

(as of March 28, 1960)

April 4	Dinner Meeting of Committee on Professional Ethics Meeting of Committee on Family Law
April 5	Meeting of Committee on State Legislation Dinner Meeting of Committee on Insurance Law Dinner Meeting of Committee on Rent Control Law
April 6	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
April 7	Dinner Meeting of Committee on the Bill of Rights
April 12	Meeting of Committee on State Legislation
April 13	Dinner Meeting of Committee on Real Property Law Dinner Meeting of Committee on State Legislation
April 18	Meeting of Library Committee
April 19	Dinner Meeting of Committee on Administrative Law
April 20	Meeting of Committee on Admissions Dinner Meeting of Committee on Trade Marks and Unfair Competition Dinner Meeting of Committee on Federal Legislation Dinner Meeting of Committee on Foreign Law
April 21	Dinner Meeting of Committee on Courts of Superior Jurisdiction Dinner Meeting of Committee on Municipal Affairs
April 26	Dinner Meeting of Committee on Aeronautics *15th Annual Art Exhibition*—Opens 4:30 P.M. Meeting of Committee on Arbitration
April 27	Dinner Meeting of Committee on Domestic Relations Court Dinner Meeting of Committee on Copyright Dinner Meeting of Committee on International Law

May 2 Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Municipal Court of the City of New York

May 3 Dinner Meeting of Committee on Insurance Law
Meeting of Section on Wills, Trusts and Estates

May 4 Dinner Meeting of Executive Committee

May 10 *Annual Meeting of Association,* 8:00 P.M., *Buffet Supper,* 6:15 P.M.

May 11 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on the Bill of Rights

May 12 Dinner Meeting of Committee on Legal Aid

May 13 *The Association Ball*—Sponsorship Entertainment Committee

May 16 Meeting of Library Committee

May 17 Dinner Meeting of Committee on Aeronautics
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Symposium: Committee on Arbitration
Dinner Meeting of Committee on Administrative Law

May 18 Meeting of Committee on Admissions
Dinner Meeting of Committee on Trade Marks and Unfair Competition
Dinner Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Municipal Affairs

May 24 Meeting of Committee on Domestic Relations Court

May 25 Dinner Meeting of Committee on Trade Regulation
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on International Law

The Future of the Judicial Process: Challenge and Response

By THE HONORABLE BERNARD BOTEIN
Presiding Justice
Supreme Court, Appellate Division, First Department

THE NINETEENTH ANNUAL BENJAMIN N. CARDOZO LECTURE
DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF
THE CITY OF NEW YORK ON FEBRUARY 25, 1960

The distinguished man of law in whose memory these lectures are given had the foresight and judicial statesmanship to advocate a ministry of justice which could cope with problems besetting courts.[1] He spoke for an agency that would watch the law in action, mediate between legislature and courts, and "report the changes needed when function is deranged."[2] The valuable and constructive achievements of this state's Law Revision Commission are a steadily rising monument to his foresight and judgment.

But the watchtowers so thoughtfully plotted by Judge Cardozo thirty-eight years ago must now be pushed far forward to fulfill the dreams of the architect. We must anticipate and forestall future problems, and not merely await the massed impact of their arrival. I shall not discuss, as did Judge Cardozo, the need to resolve situations that are upon us. Rather, I shall speak of problems which, though not imminent, loom as likely because of the effects upon the judicial process of clearly emerging patterns of American life.

Until recently, the pace of social, political, technological and industrial change was such that the law's solutions could lag a respectable distance behind the emergence of the problems newly created by such change. The law's digestive process—the much-vaunted adaptability of the common law—was almost as imperceptible as the changes themselves. We circled warily around the unseasoned and unestablished. One of the dividends of the slow

march of the law has been that en route the seasonal problems arising from short-lived public impulses tend to die off and to decide themselves. There are left the hardy perennials upon which the constant yet adaptable principles of our common law have been and will continue to be nurtured. I suspect that this marking of time has not been altogether unpremeditated.[3]

Today and tomorrow, however, the slow pace of the past would be intolerable. The swift and radical changes already here and around the corner can no longer be digested by the law without acute distress on the day of reckoning. Barbara Ward put it accurately when she told us recently that "As the world enters the Nineteen Sixties one fact seems sure. The pace of revolutionary change in every sphere of human affairs will gather momentum."[4] The telescoping within a short period of time of a quick succession of scientific miracles, of accelerated social and political changes, has brought about critical wrenches in our way of life; and there is abroad today heightened receptivity to change. We can no longer hope that these changes will settle in so gradually that the techniques and the norms of the judicial process will be permitted their own leisurely and after-the-fact accommodations without intervening periods of embarrassing futility for our profession.

We must begin to think in terms of negotiating the inevitable transformations with as few bumps as possible. Impending developments may rip our society's fabric irretrievably unless adequate adjustment is planned in advance. Intelligence is the art of anticipation—an art requisite to survival when, as now, change is both rapid and significant. Meat packers, motion picture companies, railroads, oil producers and many other industries act to cushion themselves against, or even capitalize upon, the velocity of scientific advance. Those concerned with the judicial process are likewise confronted with foreseeable, if not imminent, challenges. It will be the burden of this paper to demonstrate that we are similarly obliged to anticipate rather than merely to await the challenge and make impromptu *ad hoc* response.

An imagination informed by events would soon disclose some

of the rapidly approaching problems which will deeply affect the judicial process. The judicial function requires a thoroughly audited imagination, for when imagination falters, the seemingly sound disposition of the matter in hand later shows infirmities that can be corrected only by legislative surgery. For present purposes I shall limit myself to stitching in designs from the world of law onto clearly emerging social, economic and scientific patterns for the future—stubborn patterns that have already developed enough essential organs guaranteeing survival and showing unmistakeable anatomies of growth. Otherwise, I should be charged with piling inference on inference—an unpardonable sin in the eyes of many of my logically disciplined co-professionals. So I shall not blueprint an Utopian society, nor draw a long bow that would bring me dangerously close to the realm of fantasy or science fiction; but I shall talk of future developments only to the extent that their shapes are already definitely discernible.

Common knowledge of the increase in man's numbers—our "exploding population"—and the increase in man's life span, make statistical elaboration of these matters almost unnecessary. More than 20% of all mankind born since the dawn of history now inhabits our globe.[5] The median age in the United States in 1800 was 16; it was 30 by 1948; and it is estimated that by 1976 it will be 36.[6] Those same forces, which explain the increase in man's numbers and in his years, are shaping the historically unique phenomenon of the rise of a leisure society.

The current American scene is that of increased production and a shorter work week for the individual, yielding greater quantities of so-called discretionary income—which is the money available to be spent on non-necessities and, therefore, the ultimate gauge of wealth and leisure. The best estimate is that discretionary income will double in the next decade.[7] This dry statistic dissolves into a more familiar image in the light of the fact that even today 15% of all personal income in the United States is derived from activity no more laborious than receiving rents or dividends or clipping interest coupons, cashing social security, life insurance, or pension payments.[8] About five and a half mil-

lion persons over 14 years of age are engaged neither in work, schooling, housework, or any other such activity; and this number was only approximately 2,000,000 just ten years ago.[9] The worker, no less than the drone, benefited from the increase wrought by modern technology in production per man-hour and from the recognition of the laborer's right to leisure time evidenced in social legislation and trade union negotiated contracts.

Prior to 1800 the average work week was 80 hours; by 1900 it was 60 hours; by 1950 it was 40 hours.[10] Pressures are developing to reduce this last figure, and it is not unlikely, in view of the probable effects of automation upon our labor force, that by 1975 the average work week will be 30 hours. All these, and the diminishing round of household chores as a result of mechanical appliances, add up to the astounding picture of a society and an economy in which most of each man's waking time and energy will not be committed to earning or providing for his living, but will be available for activity of his own choice; and with this will come new values[11]—and legal provisions for treating with them.

There is no doubt that if a leisure society replaces the present leisure class, our Lady of the Common Law will welcome the newcomers and entertain them with the same competence and fairness she has displayed over the centuries.[12] Like any prudent woman, however, she will require time to put her house in order, lest she be overrun by these old friends with new problems.

The transition from feudalism to free enterprise, which Sir Henry Maine termed a change from status to contract,[13] was accommodated appropriately by expanding the recognition of real property rights to include personalty rights. Similar judicial accommodation will be required to what we might call personality rights—those rights and interests incidental to a leisure society. Personally satisfying activity, which will be nonproductive in the economic sense, will increase in quantity and importance. As the nature of leisure activity changes from the marking of time between working hours to the fulfillment of the individual's unique needs and potentials for expression and satisfaction it will reach out for judicial recognition. If, as Flaubert said, "every

notary bears within him the debris of a poet," the leisure society would allow the notary-poet to take pen in hand to draft a deed or to scribble verse; and our courts will have to recognize and protect both endeavors.

Even now privacy, mobility,[14] and freedom to hear and read as well as freedom of expression and association—the basic components of leisure—are safeguarded in many respects against invasion by government. But the rights stemming from leisure will not find their terminal in protection against governmental encroachment. The more substantial problems will arise as activities —or for that matter, inactivities—conceived from leisure will collide with traditional property rights or interests. We recall the deference which the courts originally paid the demands of industry when the fumes, dirt and noise incidental to production and transportation invaded homes and entire communities.[15] But as leisure, with its necessary emphasis upon the aesthetic rather than the functional, comes to assume new significance in our society, new balances will have to be struck. Just such readjustments are at the heart of zoning and planning legislation and regulation, for their constitutionality is in part based upon the value attached to aesthetic considerations.[16] It is, in my view, not premature to begin to contemplate seriously the up-coming need of the judicial process to deal with leisure values of privacy, beauty, and freedom of reception and expression in the system of values which will seek judicial recognition.

The judicial acceptance of leisure values in the form of legally protectable rights will necessarily import problems of judicial implementation. On the equity side, by analogizing the opportunities and the products of leisure activity to other property rights, it is not too difficult to perceive how protective equitable relief would be made available. On the law side, however, the problems raised will require creative and imaginative thinking. There will be difficulty in value-balancing, as well as problems in assessing monetary values to compensate for the impairment of non-monetary leisure values; but certainly this should not be an insuperable task for a system of law that has evolved the prima facie tort.

Traditional standards of market or replacement value will not measure satisfactorily the monetary values for deprivation of leisure. It is even doubtful whether relief for such loss can be attained adequately by the recovery of monies or goods in kind. For example, a person injured in an accident may now recover for his pain and suffering, expenses and loss of earnings. How will we compensate him for his loss of leisure values? Here, again, as in other areas to be discussed, it is appropriate to give forethought to the solutions to be evolved in the judicial process to meet the novel and unprecedented problems which we can reasonably anticipate will occur.

The society of tomorrow will, I believe, surely test the tensile strength cruelly and extend the limits of the body of law which is the product of the judicial process. Reflection will disclose that even greater stress is likely to be imposed by future developments upon the trial procedures which we today regard as so integral a part of the judicial process; and which are already evident in litigation affecting the family.

Few institutions in American society have undergone more radical transformation in the Twentieth Century than the family. It has felt the accumulated impact of all the changes impulsed by the automobile and airplane, the mass media of communication, the social revolution in morals and manners, and the technology which has produced refrigeration and all-serving home appliances. As one commentator has observed:

> "Along the path of its development the American family shed in-laws, grandparents, cousins, aunts, and retainers; it handed over production to the factory and office, religion to the churches, the administration of justice to the courts, formal education to the schools, medical attention to the hospitals, and it has even begun to hand over some of its basic life decisions to the psychotherapist. It has been stripped down to the bare frame of being marriage-centered and child-fulfilled." [17]

The dynamics motoring the current drift of the American family are far from exhausted. Social mobility continues, while

geographical mobility expands. The redefinition of the life roles of the sexes has not been completed,[18] particularly as the number of working mothers increases. Our laws and mores concerning sex shift uncertainly and uneasily from Pollyanna to Peyton Place, with an occasional taking of inventory by a Kinsey. And the middle-class American family is still deeply involved in constructing the healthy and happy relationship between parent and child.[19]

For better or worse, conscious stock-taking by all members of the family has relaxed the rigidity of the roles traditionally assigned to them; and it is not easy for courts which must function with a degree of dogma to adjust to these unsettled attitudes. Such radical and rapid changes in the intra-family frontiers, none of which has yet become fixed, result in an interregnum, necessarily unstable in nature, reflected by high rates of divorce and illegitimacy.[20] Our courts, serving as society's forum for resolving the conflicts emerging from such instability, must expect an increasing volume and variety of family problems, and will require new techniques for the consideration and accommodation of those problems.

The effect of these developments upon the judicial process is apparent. Conflict in the home and neglect of the young are now increasingly viewed as matters of community concern and not as private brawls or tragedies to be left in the courts to the fortuitous justice of the ordinary adversary procedure. In this area the judicial process is avowedly beginning to look for a solution of the situation on a societal basis—rather than a judgment for or against one or another of the persons involved.

Juvenile and family courts, and civil and criminal courts to the extent that they affect children or the family unit, are fast taking on the coloration of social problem courts rather than courts of law. Children, and often youths and their parents, are to be assisted, not prosecuted, are to be treated and not punished. To this end the trend is quickened towards the use of highly specialized tribunals—Children's Courts, Family Courts, Domestic Relations Courts,—with their attendant personnel of social workers and psychologists.[21] This body of experts will develop

increasingly the data bearing upon issues of fault or, more accurately, "cause," and relief, or, more precisely, "therapy"— a function which is, of course, performed in the field and not in the courtroom. Fact-finding is thus shifted from the courtroom, with its adversary process and rules of evidence, to the home neighborhood, with the nonjudicial mode of inquiry employed by the applied social sciences.

In the extra-judicial investigations conducted by our family courts, the state invades the private lives of children and adults in a fashion that would never be tolerated in a court handling litigation of a purely adversary nature.[22] Every indication confirms the future widening of the breaches already made in the walls of the juvenile and family courtroom, through which evidence packaged outside is delivered and accepted in a form that would stamp it as contraband in conventional courtrooms. A similar evolution is to be found in the sentencing stage of a criminal proceeding,[23] presaging still further radical alteration of the traditional judicial process. In most jurisdictions today, the sentencing procedure, like important aspects of custody, adoption, guardianship, and support proceedings, involves the use of investigation and reports by probation officers and other social workers.[24] Those reports are based upon investigations made by nonjudicial personnel out of the presence of the court or counsel, and reflect social science disciplines and techniques which are unrelated to the procedures and rules appertaining to the judicial process. No doubt Constitutional considerations will set boundaries for judicial use of these types of investigations;[25] but within those boundaries we must expect considerable enlargement of the technique.

The use by courts of extra-judicial investigative reports reflects the tendency towards the "individualization" of treatment of litigants whose problems evoke notable social values. We must anticipate that as relief in the judicial complex becomes molded more and more to meet the needs of each total situation involving social problems, the described techniques will be increasingly adapted and adopted. Plainly, this evolvement will require fundamental changes in the training and the function of the trial judge and lawyer collaborating in such litigation. They will re-

quire a greater familiarity with the disciplines of the social sciences than with rules of evidence.[26] The lawyer's function will be less that of the adversary and more that of a cooperating officer of the court, engaged in the joint enterprise of formulating some socially and legally acceptable solution to the problem at hand. This will call for anticipation and preparation, not only at the level of the contemporary bar, but in our law schools and colleges as well. It will likewise, in my judgment, become necessary to distill from our present rules of evidence evidentiary principles pragmatically suited to the evolving procedures. It is even now timely to consider the mode of adaptation of the adversary system to the imminent form of social-problem litigation. Intelligent anticipation of the stated problem may mold the shape of its solution.

Important consequences to the trial process can likewise be envisioned as flowing from the increasingly dominant role of leviathan institutions in all aspects of human endeavor. Modern man will become less and less able significantly to engage, by himself or in small groups, in the production and distribution of goods, the rendition of governmental, social or personal services, or indeed, in the arts, education, charity or religion. The signs point in a direction of departure not only from the anarchic self-sufficiency of Thoreau, but, as well, from the small economic units advocated by Brandeis. I am, unhappily, constrained to concur with the observation made in a recent paper published by the Fund for the Republic that

> "The individual does not exist as an important entity in the economic picture—and perhaps not even in the political picture. The American system is one of giants, and will continue to be so despite the anti-trust laws."[27]

Inevitably and increasingly the complex institutions within and alongside contemporary American functions will become the subject of critical litigation. The lawsuits deriving from commercial intercourse as we know it, the actions that fill our law reports —involving sales and shipments of merchandise, carriage for hire and many other types of business transactions—will decline sharply

as the flight from the courts to private arbitration[28] or public administrative tribunals continues. Even the disputes that wend their way to these informal forums will diminish in volume and intensity. The bigger the institution, whether corporation or union, the less likely it will be to put a chip on its shoulder. The heads of the giant industrial organization, unlike their counterparts in small business, will be remote from the everyday functions; and like heads of state, will become excited only about crises that affect the very fabric of their company, or about points of honor. This litigation will affect the "whole" institution, rather than its separate acts or omissions; and will be defended or initiated reluctantly and only for survival or plenary advantage.

In the criminal law, the expansion of the conspiracy doctrine will continue to develop with the growth of institutional activity.[29] On the civil side, litigation involving the Sherman, Clayton, and Robinson-Patman Acts, patents, unfair competition, corporate reorganization, and stockholders' suits typically engage massive economic units. In each instance the judicial process, which evolved historically for the adjudication of individual rights and duties, is constrained to investigate and accommodate vast problems of production, distribution, and organization more generally associated with the legislative and administrative processes. We must anticipate that many phases of these problems, and in aggravated form, will continue to remain with the courts.

The "big trial" thus likely to engage our courts obviously cannot be conducted efficiently within the framework of the traditional trial process. The issue as to whether a group of mammoth corporations have conspired on a national scale to restrain trade or to monopolize an industry and, if so, what to do about it, cannot be handled by means of those rules or techniques suitable for the trial of an issue of trespass upon land or the breach of an employment contract.

One observer of the unique evidentiary measures required by the "big trial" has described them as follows:

> "When the issues presented to a court are such that proof must of necessity be voluminous, that proof other than hearsay would normally be unavailable, or that expert

technical assistance would be unusually helpful, greater latitude should be permitted, and the courts act accordingly. These general trends should be noted: (1) greater latitude in the reception of hearsay; (2) enlargement of the concept of original entries; and (3) enhanced acceptance of expert opinion."[30]

No less unique is the trial court's responsibility in the drafting of the decree in the "big trial." The late Supreme Court Justice Rutledge remarked that

"The anti-trust injunction suit is in form 'a proceeding in equity.' In substance, it is public prosecution, with civil rather than criminal sanctions, for vindication of public right and for redress and prevention of public injury. To regard the fashioning of appropriate relief in such a suit as identical with the same function in private litigation is to disregard at once the former's statutory origin, its public character, and the public interest it protects. * * * "[31]

Thus, as we noted in litigation affecting the integrity of the small family unit, industrial litigation that can result in large-scale public detriment will be governed importantly by the concept of therapy for society as a whole.

To date, our courts have engaged in *ad hoc* improvisation to meet the problems of personnel, expertise, rules of evidence, and implementation of judgments and decrees occasioned by the "big trial." But if, as may be anticipated, the "big trial" becomes increasingly a consequential occupant of the courtroom, more enduring, uniform and universal solutions will be necessary.[31a] In the "big trial," as in criminal, matrimonial, and juvenile proceedings, the techniques and the disciplines of the social sciences —here those of the economist, the statistician, the historian—subordinate the arts of the traditional adversary advocate. We must, therefore, expect that the judicial search for facts and remedies will, likewise, in the future, assume a different cast in the "big trial." And we must, further, expect that the lawyer's role in the

"big trial," as in other proceedings utilizing the social sciences to assist in the adjudication and disposition of litigation, will be transformed. In the "big trial" of the future the lawyer may serve as a sort of supervisory scientist, marshaling and presenting as impressively as possible for his side the findings and conclusions of an entire team of other scientists.

And what of the lawyer who does not represent giant corporate and union interests? The most substantial future contacts between the bar and the judicial process that can be envisaged with some certainty will be in the representation of private rights involving the status or liberty of the individual, and relatively modest economic interests. Litigation, as we know it, will be confined principally to criminal, matrimonial, surrogate, realty, property damage, collection suits, possible personal injury actions, and proceedings involving organizational or institutional membership and judicial review of administrative action. These are principally the litigated problems of middle- and lower-income classes,[32] and do not hold out to the profession the same financial and other rewards to be found in advising and counseling corporations and other large institutions.

The ranks of the general practitioners who are such a source of reliance and comfort to individuals and families will diminish sharply in number and ability. The best minds of the profession will be drawn into advising the so-called power pyramids—giant corporations, unions and other institutions.[33] They will also advise the individuals in the upper executive echelons of these institutions in their private affairs. The lawyer-client relationship may well become more transient and less enduring.

At one time the lawyer was bigger than his client, and he moved naturally and gracefully from leadership of clients to group and community leadership.[34] His stature in the community derived from the public confidence in his learning and practical wisdom. Now the most wonderfully endowed lawyer may represent a business complex so colossal and impersonal that no one individual can affect its course appreciably. Less and less will the practice of the law be an internship or proving school in public leadership.

In fact, all the signs and portents indicate that the organization lawyer will fuse into the organization man. He will develop an institutional loyalty that will make his campus allegiances seem anemic; he will never sing solo, but only raise his voice in the institutional chorus. But in the grand and glorious annals of the bar, it has been through singing solo that our men of mark have gained their strength and courage, their color and character. Whether working for a large law firm or a large corporation, the lawyer of today is remote from the role that made the practice of law an exciting and zestful calling for the lawyer of yesterday; and he seldom so identifies with a client as to hold his hand before crisis, to lament or rejoice afterward. He is not warmed by the respect, affection and gratitude of clients and clients' families, whom he has guided wisely and conscientiously. It is all very well to scoff at these manifestations, but professional successes can be quite sterile without them.

Many lawyers today are on a professional assembly line.[35] One checks a client's documents for tax perils, another for libel possibilities, others for labor, anti-trust and all the other problems that may beset modern enterprise. Harvey Swados, commenting on those professionals who are "all-but-anonymous units in the firm's labor force," makes the painful pun that the difference between them and factory workers may be only one of degree. He very perceptively observes:

> "Surely we must now realize that the young attorney, clerking in a huge law factory, or the young business administration graduate, disappearing into the paternal embrace of the giant corporation, can rarely get from his daily work the satisfaction—to say nothing of the thrill—that his father did."[36]

Nor can a young lawyer so placed develop the same sturdiness and resourcefulness that made his father a many-dimensioned human being and a leader in his community.

Again, if we project our speculations on the judicial process with a little more velocity and trajectory we reach problems of

even greater and more stunning magnitude. For one clearly discernible and inexorable development involves our still-frightening interventions into the privacy of the mind. In little more than half a century we have traveled from Freud to Hitler to subliminal projection—all encompassed within the notion that the operations and motivations of our mental processes are knowable, controllable, and even exploitable. In his "Brave New World Revisited," Aldous Huxley is understandably appalled at the extent to which his fantasies of more than 25 years ago have been realized in modern manipulation of minds and emotions. Irrespective of the validity of Huxley's or Orwell's dire predictions, it is certain that by means of psychoanalytical, narcoanalytical, and electronic techniques and devices, motivational research and chemistry, we will attain greater insight into and control over the two billion units comprising the brain. This rapidly advancing frontier of the sciences that is being staked out amidst the mysteries of the mind augurs revolutionary changes in the trial process.

Fact-finding for trial purposes is typically dependent upon testimony reflecting the recollection of witnesses. Limitations of conscious memory, aside from self-interest and partisanship, make this process painfully fallible, notwithstanding the potency of cross-examination, that revered rectifier of purposeful fabrication or unwitting error. We cannot relegate to the world of science-fiction recent experience with drugs such as scopolamine and the barbiturates (sodium pentothol and sodium amytal), techniques such as hypnosis, and devices such as the lie-detector. They suggest the eventual emergence of scientifically accepted procedures for inducing the full and truthful recollection of events or for validating the accuracy of recollection. The present unperfected nature of these fact-finding interventions, the fact that they are not uniformly operative and that some persons are able to lie or withhold information, form no basis for blinking the problems promised by their ultimate perfection, but, rather, provide time to reflect upon those problems.[37]

Our traditional litigation ground rules are designed to elicit

truth on the notion that justice will follow truth. But what if science will reproduce truth more reliably and effectively than does our present system? When that time arrives, and science establishes the truth through more trustworthy means, we shall not be able to defer our rendezvous with progress. Anticipation of the time when scientific research and experience in fact-finding satisfy the test of "general acceptance in the particular field in which it belongs"[38] is no more than an attempt to come to terms now with the advance guard of the march of progress rather than to wait until we are overrun.

The threshold question is whether parties and witnesses could be compelled to submit to the hypothesized procedures—at least in the absence of self-incrimination. Each of the techniques involves adducing facts which the one interrogated may be unwilling consciously to reveal. To that extent, each of the techniques entails an invasion of the privacy, as well as the freedom of will, of the witness. Whether these invasions, undertaken for the purpose of truth-finding, are as invidious as the stomach-pumping proscribed in *Rochin* v. *California*,[39] or no less abnoxious than the medical examinations prescribed in certain personal injury actions,[40] will require a careful consideration and balancing of interests.

The more authentic the data dredged from the unconscious will become, the more heed we should give to the reminder found in a perceptive article by Professor Silving, "that as soon as expert testimony as to the results of psychological tests is, in principle, admitted, the weight of procedure will shift from the courtroom to the testing laboratory. The psychiatrist will become the real judge. Moreover, like torture, psychological testing cannot be conducted in public. Where the issues are decided in a laboratory, the institution of public trial is obviously a farce."[41] While our adversary system of litigation may not prove to be the best means of ascertaining truth, its emphasis upon respect for human dignity at every step is not to be undermined lightly in a democratic state. Political and social dangers inhere in the manipulation of the individual will by the state—and also in pitting dignity against

truth. Even if time permitted, the purpose of this lecture is not to argue for any position on any of these highly provocative and controversial problems, but to urge study and exploration in sufficient time to ensure a well-considered rather than an impulsive course of action by bench and bar.

If we cross the threshold issue of the admissibility of data elicited by narcoanalysis, hovering beyond are the other consequences to the entire trial process implicit in truth production by means other than the conventional interrogation of witnesses by counsel. For the adversary system of trial, dependent as it is upon the concept of permitting competing counsel to elicit facts, would prove substantially incompatible with the new techniques ensuring accuracy in the presentation of past events to a court. If through narcoanalysis witnesses can be depended upon to give truthful testimony, as they recall it, will there be need for cross-examination, the privilege against self-incrimination, the presumption of innocence, burden of proof, and ultimately, lawyers, judges, jurors? In fact, why our entire adversary system of litigation, based as it is on the theory that the self-interest of the contending parties will cause them to put each other's evidence to the acid test? As the novel methods of proof here discussed assume greater scientific validity, serious questions must arise as to whether findings of fact, of intention or of motive can be left to the non-scientific community of judges or juries; or whether that function will be for those whose special skills and training more particularly qualify them to appraise the materials resulting from such methods.

The role of judge and jury in applying community standards of reasonableness, fairness, morality, etc., to the facts will also require re-thinking in the light of still other related and imminent developments. For the disciplines of psychology and statistics have collaborated to the point of gauging with considerable sensitivity and precision the sentiment of the community on matters ranging from deodorants to Presidents. The application of polling to various trial issues is obvious. We can serenely contemplate the use of public opinion polls to prove public con-

fusion in unfair competition and infringement cases, public opprobrium in suits for defamation, and public morality in obscenity and immigration cases.[42] But the full reach of the logic of the trial use of polls does not end with these enumerated instances.

Polls assume the ability to discern and express the sentiment of a given community—precisely the function attributed to the jury acting as a cross-section of the community. Even the severest critics of polling methods would acknowldge the superiority of polls to the jury in accurately reflecting the views of a community. The expert would consider one jury entirely too small a sampling for polling purposes to give any validity to its findings. It remains, then, only to ponder the consequences to the jury system if and when public opinion polling undertakes to determine what the hypothetical "reasonable man"—that staple of all trials—would do in a given factual situation.

I am not portraying any of these emerging patterns under discussion as boon or spectre. Some could undoubtedly elevate the administration of justice in this country, some could lower it. The only ugly spectre I have designedly raised is that of a bench and bar broken on the wheel of a deficient court system about which they were neither concerned nor aware enough to take a hand in shaping. Such an abdication would be a breach of the trust imposed in us by the public we have been taught to serve, and furthermore, would serve to undermine the enlightened self-interest of the profession.

Of course, I have not exhausted the challenges to the judicial process which we may reasonably expect. Every informed and interested lawyer could supplement the instances cited. But neither lawyer nor judge today has recourse to the necessary institutional facilities properly to exploit his prescience. I suggest that we must provide competent, specialized means of assuring regular, periodic and anticipatory appraisal, not only for existing problems affecting the judicial process, but for emerging problems as well.

It is patently inefficient, if not ineffectual, to leave the resolu-

tion of future problems that are presently recognizable, solely to the happenstance of the successive lawsuits in which they may arise. In that setting the watchdogs of the law will forever pursue a mechanical rabbit which will always outstrip them. The uneven calibre of counsel and judges, the strictures imposed by the particular issue in controversy, and the limited breadth of inquiry inherent in the judicial process all militate against exclusive reliance upon the case-by-case resolution.

It is also, in my view, less than responsible to relegate to the law review commentator the duty of exploring problems deemed philosophical and speculative merely because they are not immediate. This is not to denigrate the enormous influence of the germinal works of Holmes,[43] Cardozo,[44] Stone,[45] Brandeis[46] and Pound[47] in the law journals. But what I think are needed in this area are the responsibility and regularity of action, as well as the authority, that attend the duly constituted agency of government. Such continuity cannot be found in the surging and receding waves of interest of the most brilliant and enthusiastic volunteers. The scholar, whose terminal is attained in defining the challenge of the future, and the judge, who when he finishes a case with disturbing future implications must shrug them off to pick up the next set of pleadings, are not careered to carry such a continuing burden.

Nor should the function I suggest be referred to the legislature in the first instance. Many of the prospective challenges to the judicial process are not the stuff to which legislation or codification are addressed. Also, each of those challenges requires initially the kind of study associated with a permanent, scholarly institution such as the Law Revision Commission—often a long-term inquiry unsuited to a short legislative session. An *ad hoc* legislative committee would be unsuitable, since the product of the continuing thinking and research of the agency I contemplate would serve to inform not only the legislature in its proper competency, but also the courts in the exercise of the judicial function.

A unit such as the Law Revision Commission, strengthened

with auxiliary personnel trained to identify, analyze and advise on converging trends, and expanded in dimension to deal with law prevision as well as law revision, comes immediately to mind as well equipped to respond to future challenges to the judicial process. That commission is already the agency of mediation between court and legislature. It is now so placed institutionally that it can regularly, systematically and promptly receive through the judiciary well-informed advance reports from the field; and also detect trends through antenna aimed at other areas. Judges and other men of law, properly alerted, would ensure ample notice of the advent of trends of change. As a corollary, judicially inspired commission researches, by dint of a species of *stare decisis*, might well enjoy an authority and acceptance in the courts reminiscent, though not the equivalent, of judicial opinions.

Change is the raw data of progress. Change does not, however, become progress without the intervention of intelligence. And where change is revolutionary by reason of its speed and magnitude, anticipation is the only alternative to chaos. These desiderata I believe pertinent today to the judicial process as well as to other less encrusted institutions. As the special guardians, if not the special pleaders for the judicial process, it remains for our profession to construct the machinery of anticipation necessary to enable that process to avoid the obsolescence which is today measured by years rather than by centuries. In such a process we do not merely discount at present rates the problems of the future. We also illumine the problems of the present in that, as John Dewey remarked, "thought about future happenings is the only way we can judge the present; it is the only way to appraise its significance."[48]

NOTES

1. Cardozo, "A Ministry of Justice," 35 Harvard Law Rev. 113 (1921).
2. *Id.* at page 114.
3. See, *e.g.*, *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950).
4. Ward, "The Challenge of the Sixties," The New York Times Magazine, 12/27/59, p. 5. Another commentator has observed that present-day historic forces "are bringing about changes so vast, in a time so compressed, and with adjustments so convulsive that it is as if huge seismic slippages

were occurring in the deepest substratum of history." [Heilbroner, "The Future as History" (1960) 57.]

5. Redfield, "Talk With A Stranger" (The Fund for The Republic, Occasional Paper, 1958) 5.
6. Ernst, "Utopia 1976" (1955) 63; see also Allen, "The Big Change" (1952) c. 14.
7. See The New York Times, 1/3/60, Section 3, p. 10.
8. Parker and Mayer, "The Decade of the 'Discretionary Dollar,'" Fortune Magazine, 6/59, p. 139.
9. *Ibid.*
10. Dewhurst, "America's Needs and Resources" (1955) 1053.
11. The economic and political problems resulting from productive abundance are the subject of discussion in Galbraith, "The Affluent Society" (1958), and Heilbroner, "The Future in America," 22 The Reporter, 1/7/60, p. 29; *id.*, 1/21/60, p. 28. An excellent consideration of the ethical and philosophical issues provoked by an economy of abundance is contained in Edel, "Scarcity and Abundance in Ethical Theory," Freedom and Reason (Studies in Memory of M. R. Cohen, 1951) 105.
12. This piece of imagery does not, of course, originate with this author. See Cardozo, "Our Lady of the Common Law," 13 St. John's Law Rev. 231 (1939).
13. Maine, "Ancient Law" (Pollack ed., 1930) 182.
14. In sustaining freedom to travel as a constitutionally protected right, Mr. Justice Douglas, writing the majority opinion for the United States Supreme Court in *Kent* v. *Dulles*, 357 U.S. 126 (1956), commented that "Freedom of movement also has large social values" (p. 127), referring *inter alia* to leisure travel.
15. See 46 C.J. 655–658, 683–689.
16. In *Berman* v. *Parker*, 348 U.S. 26, 33 (1954), the Supreme Court observed:
    " * * * The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. * * * "
17. Lerner, "America as a Civilization" (1957) 552.
18. See Mead, "Male and Female: A Study of the Sexes in a Changing World" (1949) *passim*.
19. See Lerner, *op. cit. supra*, 560–570.
20. It has been recently reported that the rate of illegitimacy has trebled in the 20-year period from 1938. New York Times, 8/9/59, p. 62.
21. See Gellhorn, "Children and Families in the Court of New York City" (1954) *passim;* Kahn, "A Court for Children" (1953) *passim*.
22. See Comment, "Use of Extra-Record Information in Custody Cases," 24 Univ. of Chicago Law Rev. 349 (1956); Note, "Employment of Social Investigation Reports in Criminal and Juvenile Proceedings," 58 Columbia Law Rev. 702 (1958); Note, "Correct Use of Background Reports in Juvenile Delinquency Cases," 5 Syracuse Law Rev. 67 (1953).

23. See Note, "Right of Criminal Offenders to Challenge Reports Used in Determining Sentence," 49 Columbia Law Rev. 567 (1949); Rubin, "Probation and Due Process of Law," 31 Focus 40 (1952); Note, "Employment of Social Investigation Reports in Criminal and Juvenile Proceedings," 58 Columbia Law Rev. 702 (1958). The constitutionality of the use of investigative reports has been sustained in connection with sentencing. *Williams* v. *New York*, 337 U.S. 241 (1949).
24. See Note, *supra*, 58 Columbia Law Rev. 702 (1958), for a full review of the jurisdictions using extra-judicial investigative techniques.
25. The recent decision of the First Department in *People ex rel. Fields* v. *Kaufmann*, 9 A.D. 2d 375, 378 (1959), points out that "reports of experts" in custody matters "are incalculably beneficial as aids to the court," but "that they are only aids and, if not woven into the fabric of the record, should not form the base for the decision."
26. An earlier and stimulating discussion of the need for the social scientist-judge is to be found in Pekelis, "The Case for a Jurisprudence of Welfare," reprinted in his "Law and Social Action" (1950) 1.
27. Miller, "Private Governments and the Constitution" (1957) 7. In his "The Future as History" (1960) 74, Heilbroner puts it that "whereas man made his peace with nature largely as an individual—as a farmer, a hunter, a fisherman, a sailor—he makes his peace with technology through social organization."
28. Judge Peck has pointed out that in New York alone 60 trade associations have arbitration tribunals to which conflicts are brought. Peck, "Our Changing Law," 43 Cornell Law Q. 27, 32 (1957).
29. See Note, "Developments in the Law of Criminal Conspiracy," 72 Harvard Law Rev. 920, 922–925 (1959).
30. Dession, "The Trial of Economic and Technological Issues of Fact: II," 58 Yale Law J. 1242, 1243 (1949); see also *United States* v. *General Electric Co.*, 82 F. Supp. 753, 903–904 (D.N.J. 1949); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 298–299 (D. Mass. 1953).
31. *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 441–442 (1945).
31a. The systematic techniques being fashioned by the federal judiciary to cope with the "big trial" are the subject of the Report on Procedure in Anti-Trust and Other Protracted Cases adopted by the Judicial Conference of the United States, 9/26/51 [13 F.R.D. 62 (1953)], and the Proceedings of the Seminar on Protracted Cases for United States Judges held at the School of Law, Stanford University, 8/25–30/58 [23 F.R.D. 319 (1959)]. See also McAllister, "The Big Case: Procedural Problems in Antitrust Litigation," 64 Harvard Law Rev. 27 (1950); Whitney, "The Trial of an Anti-Trust Case," 5 Record 449 (1950).
32. Blaustein and Porter, "The American Lawyer: A Survey of the Legal Profession" (1954) 45.
33. Almost 35 years ago Judge Learned Hand remarked that "in my own city the best minds of the profession are scarcely lawyers at all." Proceedings, Association of American Law Schools (1925) 45; see also Mills, "White Collar Worker" (1951) 121–129, for the provocative contention

that following "the ascendancy of the large corporation" (p. 121), the successful lawyer has shifted from "an agent of the law, handling the general interests of society" *(ibid.)* to an "office in the image of the corporations he has come to serve and defend" (p. 122).

34. It was pointed out in 1948 "that more than two-thirds of the men who have held the American presidency have been lawyers. That is true of over 70% of cabinet officers. It holds for 58% of state governors since 1865. Since that date, also, 72% of the Senate and 64% of the House have been lawyers; and, taking ten states as a sample, 71% of their legislatures were composed of lawyers." Laski, "The American Democracy" (1948) 572–573; see also Commager, "The American Mind" (1950) 364.
35. The transition from the great lawyer to the great law firm is amply confirmed by a predecessor lecture in the Cardozo series: Tweed, "The Changing Practice of Law," 11 Record 13 (1955). The reason for the transition is, no doubt, that the average income of a member of a law firm tends to increase with the size of the firm. Blaustein and Porter, *op. cit. supra,* 11.
36. Swados, "Work as a Public Issue," 42 Saturday Review of Literature, 12/12/59, p. 15.
37. See Silving, "Testing of the Unconscious in Criminal Cases," 69 Harvard Law Rev. 683 (1956); Dession, et al, "Drug-Induced Revelation and Criminal Investigation," 62 Yale J.J. 315, 316–320 (1953); Floch, "Limitations of the Lie Detector," 40 J. Crim. L. and Criminology 651 (1950), for discussions of the problems raised by the use of drugs and lie-detectors as fact-finding techniques.
38. *Frye* v. *United States,* 293 Fed. 1013, 1014 (D.C.Cir. 1923).
39. 342 U.S. 165 (1952).
40. See, *e.g.,* Rule XII, New York County Supreme Court Rules.
41. Silving, *op. cit. supra,* at page 702.
42. See Barksdale, "The Use of Survey Research Findings as Legal Evidence" (1957) *passim;* Note, "Public Opinion Surveys as Evidence: The Pollsters Go to Court," 66 Harvard Law Rev. 498 (1953).
43. Holmes, "Malice and Privilege," 8 Harvard Law Rev. 1 (1895); "Codes, and the Arrangement of the Law," 5 American Law Rev. 1 (1870).
44. Cardozo, *op. cit. supra,* at note 1.
45. Stone, "The Public Influence of the Bar," 48 Harvard Law Rev. 1 (1934); "The Common Law in the United States," 50 Harvard Law Rev. 4 (1936).
46. Brandeis and Warren, "The Right to Privacy," 4 Harvard Law Rev. 193 (1890).
47. Pound, "Mechanical Jurisprudence," 8 Columbia Law Rev. 605 (1908); "The Call for a Realistic Jurisprudence," 44 Harvard Law Rev. 697 (1931); "A Theory of Social Interests," 15 Papers and Proceedings of the American Sociological Society 16 (1921).
48. Dewey, "Human Nature and Conduct" (Mod. Library ed. 1930) 267.

Employers' Rights and Duties Under the New Federal Labor Law

By WOODROW J. SANDLER

The Labor-Management Reporting and Disclosure Act of 1959 (the "Landrum-Griffin" law) was approved by President Eisenhower on September 14, 1959.

Although its passage was an outgrowth of the McClellan Committee hearings on labor-management "improper practices," it sweeps with a much broader brush. Companies engaged in activities which they believe to be perfectly legal and proper may nevertheless come within the purview of the Act's "Reporting and Disclosure" provisions.

On the other hand, companies which have either wilfully or misguidedly engaged in illegal or improper activities in labor relations, are faced with a different problem; namely, the Constitutional aspects of compulsory disclosure of what they have done.

The Act contains several important amendments to the Taft-Hartley law, involving Federal-State jurisdiction, picketing, boycotts and N.L.R.B. elections.

In the following summary, the most important provisions of the new law have been paraphrased in order to present in non-statutory language a synopsis of the rights and duties created. Obviously, no one should rely upon this general outline but the actual text of the statute should be consulted.

Editor's Note: This article is intended only for members of the Bar who do not practice in the Labor Relations field and desire a simple "birds-eye" view of the Landrum-Griffin law. Accordingly, in furtherance of this purpose, citations have been omitted and labor relations jargon has been avoided wherever possible. Numerous provisions regulating the internal affairs of labor unions have also been omitted. Mr. Sandler is a member of the Association's Committee on Labor and Social Security Legislation.

I. "REPORTING AND DISCLOSURE PROVISIONS"

What are they? In general, employers covered by this portion of the law, must file reports with the Secretary of Labor, concerning any of the following:

a. Payments or loans of money or other thing of value (including reimbursed expenses) to any union, or to a union official, shop steward, or other representative.
b. Payments to employees or "employee committees" to influence other employees in their organizational activities, unless such payments are disclosed to all the employees.
c. Any expenditures made for the purpose of influencing employees in an illegal manner, in their right to self-organization.
d. Agreements with any labor relations consultant who is hired to persuade employees one way or another as to their right to organize, or to report on the employees' activities during a labor dispute.

It will be noted that not all of the above reporting concerns activities which are necessarily illegal or stem from improper motives. If an employer, for example, lends money to one of his employees who happens to be a union shop steward, this could conceivably be both illegal and reportable under the new law, even though the employer had no improper motive.

Further, "persuasion" by a labor relations consultant might be legally permissible if it came within the framework of the "free speech" amendment of the Taft-Hartley Law. Nevertheless, the employer may have to report the relationship, legal or no. (Under certain circumstances labor relations consultants also have to file reports).

What Need Not Be Reported

Expenses incurred by a company in connection with the giving of advice or in connection with any legal proceedings such as

court, N.L.R.B. or arbitration, or for collective bargaining negotiations, need not be reported.

Which Employers are Subject to these Requirements?

The coverage of the reporting portion of the law is the broadest possible. Any employer who is engaged in an industry "affecting commerce" is subject to the reporting and disclosure provisions, if he is an "employer within the meaning of any law of the United States relating to the employment of any employees," or if he deals with any labor organization.

What are the Penalties?

The Act, and the rules and regulations issued thereunder, set up time-tables for the filing of reports.

For wilful failure to file, or making false statements, criminal penalties are imposed, including possible fines up to $10,000.00 and/or imprisonment up to one year.

II. TAFT-HARTLEY AMENDMENTS

These amendments principally affect the operation and jurisdiction of the National Labor Relations Board.

Which Employers are Covered?

Companies whose operations "affect commerce" come under the Labor Board's jurisdiction, except certain industries such as those subject to the Railway Labor Act and non-profit hospitals, which are exempt by statute from the Board's jurisdiction.

However, as of August 1, 1959, the Board had announced certain "jurisdictional standards" based upon minimum dollar-value of annual business done, as a prerequisite to its assumption of jurisdiction. These are now "frozen" by the new law and the Board therefore *must* continue to assert jurisdiction over companies whose volume of business meets those standards.

Subjects to this "freeze," the Board may decline jurisdiction over companies whose operations do not meet Board standards, or do not "substantially" affect commerce.

Before the new law was passed, there were many smaller companies whose activities "affected commerce" but over whom the N.L.R.B. declined jurisdiction. Such companies at the same time were also held to be excluded from State coverage because Congress had "pre-empted" the field of Labor Relations in commerce. These firms were thus in a "no man's land" where the N.L.R.B. would not take jurisdiction and State Courts and agencies could not.

Under the new law, this so-called "no man's land" has been abolished. The States may now assert jurisdiction in any case where the National Board declines it.

"Organizational" or "Recognition" Picketing

The picketing of an employer by a union which does not represent his employees was a major problem confronting the framers of the Act. For example, many unions had used this as a device to force the picketed concern to "sign-up," or else suffer severe business losses.

The Taft-Hartley law had not expressly prohibited picketing of this type. Under the new Act, however, picketing by an uncertified union, where the objects is to "force or require" the employer to deal with the union, is made illegal in three situations:

a. Where the employer has a contract with a rival union, which would bar an N.L.R.B. election; or
b. Where the picketing occurs within twelve months after an N.L.R.B. election; or
c. Where no petition for an N.L.R.B. election has been filed within a reasonable time (not to exceed thirty (30) days) after the picketing commences. (If a petition is filed, the Board is directed to hold an election "forthwith").

An important proviso permits "publicity" picketing, provided it does not cause interference with deliveries or with the performance of any services by employees of other concerns.

The injunctive relief provided for in the above situations may

be sought only by the N.L.R.B., at the behest of the charging party.

Secondary Boycotts

The new Act "tightens" the Taft-Hartley prohibitions against the secondary boycott (pressure against a neutral employer who does business with the company with whom the union is having a dispute).

It is now illegal for a union to exert pressure on the neutral employer himself (formerly, the law barred pressure only upon the neutral's *employees*). Moreover, the union cannot now coerce the neutral firm's employees "one at a time" (this was formerly permitted). Finally, the boycott is now illegal even if the neutral company is exempt from the Taft-Hartley Law, such as a railroad (formerly, the Labor Board had held such picketing of a neutral's premises legal, but the Courts rejected the Board's position).

"Hot Cargo" Clauses

These are provisions in collective bargaining contracts in which an employer agrees with a union that he will not handle the goods of some other Company whom the union designates as "unfair."

Under the new law, these clauses are unenforcible and void, and both parties to the agreement commit an "unfair labor practice" if they enter into it. (Exempt from this provision are various contracts covering building construction work and in the clothing industry).

National Labor Relations Board Elections

(a) *Strikers*

Strikers, even if they have been replaced and are not entitled to have their jobs back, are now permitted to vote (under such regulations as the Board shall find are consistent with the Act) in any N.L.R.B. election which is conducted within twelve months after the commencement of the strike. In other words,

it may be possible for both the strikers and their replacements to vote.

Strictly construed, this amendment would make it possible for 100 economic strikers and the 100 employees who had replaced them permanently, to vote in the election, even though the strikers were no longer employees and had no future stake as such in the results.

(b) *Filing Requirements*

The requirement that union officers file non-communist affidavits as a condition of using the procedures of the N.L.R.B. has been repealed.

Instead, the new law prohibits ex-communists and certain ex-criminals from representing management or labor for a period of five years after termination of communist party membership or of the prison sentence, as the case may be.

CONCLUSION

The new Federal Labor Law ("Landrum-Griffin") contains within itself perhaps more problems than it attempts to solve. It will be several years before the full meaning of various of its provisions is determined in the course of litigation.

In the meantime, it is hoped that this summary will alert members of the bar to some of the rights and duties under the law.

Conflict-of-Interest Laws

I

INTRODUCTION AND SHORT SUMMARY

We are today releasing a pre-publication edition of a Report based upon more than two years of study of the so-called "conflict-of-interest" laws of the Federal Government. Also, we expect that there will be introduced today in both Houses of Congress a proposed "Executive Conflict-of-Interest Act," which has been drafted by this Committee and which is designed to remedy the manifold defects of the present law. Our findings and recommendations, which are set forth in the Report, are expressed in statutory form in the proposed Act.

The Report will be published in the summer by the Harvard University Press.

This Committee is issuing this pre-publication mimeographed edition of its Report so that it will be available at the public hearings on the topic of the conflict-of-interest laws which commenced on February 17, 1960, before the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives. The House Judiciary Committee, under the Chairmanship of Representative Emanuel Celler of New York, has already made an important contribution to the wider understanding and improvement of this confused, but crucial, area of law and public administration. The public hearings, which have just opened, should further advance the cause of urgently needed reform. Accordingly, we have distributed some two hundred mimeographed copies of a pre-publication edition of the Report to members of Congress, the press and to various Federal departments and agencies.

This Official Summary has been prepared for the information

Editor's Note: Printed here is the text of the official summary of the Report of the Association's Special Committee on the Federal Conflict-of-Interest Laws, Roswell B. Perkins, Chairman. The pre-publication edition of the Report and this summary were made public on February 23, 1960. The full Report of the Committee will not be available until summer when it will be published by the Harvard University Press.

and guidance of those interested persons to whom the Report is not available and as a guide to the Report.

A. OBJECTIVES

The Report of the Committee has two themes. The first is that ethical standards within the Federal Government must be beyond reproach, and that there must, accordingly, be effective regulation of conflicts of interest in Federal employment. The second is that the Federal Government must be in a position to obtain the personnel and information it needs to meet the demands of the Twentieth Century.

These themes are coequal. Neither may be safely subordinated to the other. What is needed is balance in the pursuit of the two objectives. We need a long-run national policy which neither sacrifices Governmental integrity for opportunism nor drowns practical staffing needs in moralism. We need a careful regulatory scheme that effectively restrains official conflicts of interest without generating pernicious side effects on recruitment.

The basic conclusion of the Committee is that such a scheme can be worked out. The Report and the proposed Act contain a recommended new program for achieving this result.

B. ASSESSMENT OF EXISTING RESTRAINTS

The Committee has concluded that the legal and administrative machinery of the Federal Government for dealing with the problem of conflicts of interest is obsolete, inadequate for the protection of the Government, and a deterrent to the recruitment and retention of executive talent and some kinds of needed consultative talent.

1. *Obsolescence*

The statutory law—most of it a century old—is not broad enough to protect the Government against the manifold modern forms of conflict of interest. Most of the statutes were and are pointed at areas of risk that are no longer particularly significant,

mainly the prosecution of Government claims. Today, with the greatly expanded regulatory functions of the Federal Government, applications for rulings, clearances, approvals, licenses, certifications, grants and other forms of Government action are far more significant in the daily operation of Government than the prosecution of claims. Several of the basic statutes now on the books do not concern themselves at all with these modern Governmental activities.

Other aspects of obsolescence in the present statutes are:

(a) Their focus of interest upon a class of lower ranking politically appointed clerks that has disappeared. The Government today obtains its manpower through a vast civil service, a top layer of short term political appointees, an increasing group of advisory and part time personnel, and through an unlimited variety of contracts for services provided by non-Government personnel.

(b) Their failure to recognize internal procedures of modern Government, such as the flexible processes of personnel administration available to assist in enforcement.

(c) Their lack of recognition of the facts of modern economic life, such as the existence of private pension plans.

(d) Their failure to recognize the essential blending of public and private endeavor in the modern American society, as illustrated by the partnership of government, industry and educational institutions in the science field.

2. *Inadequate administration*

Partly by reason of the deficiencies in the statutory law, administration of the conflict-of-interest restraints has always been weak. The Government has failed to provide a rational, centralized, continuing and effective administrative machinery to deal with the problem. If the statutes presented a coordinated whole—a unified program—and if they imposed direct responsibility on the President to carry out that program, the central coordination

and leadership missing in the past would improve. A well-administered program could, and should guide the thousand good men as well as snare the one bad one.

3. *Uncertainty in interpretation*

Enacted fitfully over a 100-year span, the uncoordinated statutes are inconsistent, overlapping and at critical points defy interpretation.

4. *The Congress*

Congress has done a useful and constructive job in its capacity as investigator. But the Senate confirming committees have seldom considered the overall issue of conflict of interests in relation to recruitment. The Armed Services Committee has applied a wavering standard of stock divestment, useful for certain purposes, but overemphasizing one single source of conflict-of-interest problems and having little bearing on the question of actual official conduct.

5. *Recruitment*

The main adverse effect of the present system is its deterrent effect on the recruitment and retention of executive talent and some kinds of consultative talent. The restrictions tend to encircle the Government with a barricade against the interflow of men and information at the very time in the Nation's history when such an interflow is most necessary.

C. RECOMMENDATIONS

The defects in the present law cannot be cured by tinkering. A thorough-going reconstruction is called for—a new program of controls designed for modern needs, providing for adequate administration and written as an integrated unit. The program must achieve a balance between the Nation's need for protection against conflicts of interest and its need for personnel.

The Committee's basic recommendations are these:

1. "Conflict-of-interest" problems should be recognized and

treated as an important, complex, and independent subject of attention and concern in the management of the governmental establishment.

2. The present scattered and uncoordinated statutes relating to conflicts of interest should be consolidated into a single unified Act, with a common set of definitions and a consistent approach. Archaic provisions should be repealed.

3. The restraints contained in the present statutes should be greatly expanded in their scope by making them applicable to essentially all matters in which the public deals with the modern Federal Government.

4. Certain important restraints now covered in regulations or not at all should be included in the basic statutes, particularly restraints relating to receipt of gifts and coercive use of office.

5. The statutes should permit the retention by Government employees of certain security-oriented economic interests, such as continued participation in private pension plans.

6. Wherever it is safe, proper and essential from the viewpoint of recruitment, the statutes should differentiate in treatment between regular employees and citizens who serve the Government only intermittently, for short periods, as advisers and consultants.

7. Regular, continuing and effective enforcement of the law and regulations should be assured by emphasizing administrative remedies, rather than the clumsy criminal penalties of present law.

8. The statutes should create the framework for active and effective administration of the system of conflict-of-interest restraints, headed up with clear responsibility in the President. The President should designate, pursuant to the proposed Act, an Administrator to assist him in this function.

9. In addition to the statutes themselves, there should be a "second tier" of restraints, consisting of Presidential regulations amplifying the statutes, and a "third tier," consisting of agency regulations tailored to the needs of particular agencies. The responsibility for day-to-day enforcement of the statutes and regulations should rest upon agency heads.

10. At all levels of administration potential conflict-of-interest problems should be headed off by preventive action, such as, for example, orientation programs for all new employees to acquaint them with the applicable conflict-of-interest rules, and periodic reminders as to such rules.

11. There should be more effective prohibitions and penalties applicable to persons outside Government who induce or participate in conduct by Government employees in violation of the conflict-of-interest laws.

12. Each committee of the Senate considering a Presidential nominee for confirmation should be given the benefit of a full analysis, prepared by the Administrator in consultation with the Department of Justice, of any conflict-of-interest problems the nominee's particular situation may present. The confirming committee should give due consideration to this analysis and to the protections afforded by a modern and effectively administered overall scheme of conflict-of-interest restraints, if one is put into effect.

13. The Congress should initiate a thorough study of the conflict-of-interest problems of members of Congress and employees of the legislative branch of the Federal Government.

* * *

The program advanced here will not "solve" the problem of conflict of interests in Federal employment. Like most real problems, this is one we must live with permanently, strive to mitigate, and adjust to. The program proposed, however, will do several things.

It meets the flaws of the present pattern of conflict-of-interest restraints—obsolescence, weakness of administration and faulty drafting. It would greatly strengthen the main policy of the conflict-of-interest statutes—preservation of the integrity of Government. It would provide for an integrated and comprehensible system of standards and sanctions, together with an effective machinery for administering that system. It is grounded upon a realistic conception of the problem of conflicting interest as it appears

in the modern setting of American government and society. It would make a significant contribution toward intelligent staffing of the Federal government for world leadership.

II

MORE DETAILED STATEMENT OF THE PROGRAM

The Committee recommends a thorough reconstruction of the entire legal and administrative machinery for dealing with the problem of conflict of interest in the Executive Branch of the Government. A summary of its principal recommendations appears below:

RECOMMENDATION 1

"Conflict-of-interest" problems should be recognized and treated as an important, complex, and independent subject of attention and concern in the management of the governmental establishment.

Up until the present time, the subject of conflict of interest in the Executive Branch has been conceived of and dealt with only peripherally as an aspect of the general problem of ethics in Government. The fact is that its unique and complex nature and the variety of difficult problems it raises, particularly the problem of recruitment, demands that it be isolated and identified as an independent subject of Government concern. Until it receives the consideration and attention which it deserves, the problem of conflict of interest cannot be adequately resolved.

RECOMMENDATION 2

The present scattered and uncoordinated statutes relating to conflicts of interest should be consolidated into a single unified Act, with a common set of definitions and a consistent approach. Archaic provisions should be repealed.

One of the principal shortcomings of the present law is that it is composed of many diverse elements scattered throughout the statute books and containing inconsistencies, overlappings and

exemptions. The chaotic nature of the law is an impediment to understanding and a deterrent to recruitment.

The proposed Act would unify the general law of conflict of interest in one comprehensive statute. Basic terms would be defined and then used consistently throughout. Examples of key terms, carefully defined at the outset and then used consistently throughout the proposed Act, include: "Government action"; "transaction involving the Government"; "assist"; "participate"; and "responsibility."

The proposed Act would treat the basic forms of conflict of interest in a logical progression. The first of the six substantive restraints deals with action by a Government employee *in his official capacity* in a matter in which he has a personal interest. The second deals with action by a Government employee *in his private capacity* in furtherance of an interest adverse to the Government. The third deals with receipt of *pay* from outside sources. The fourth deals with receipt of *gifts* from outside sources. The fifth deals with action as a Government official designed to *induce* payments from outside sources. The sixth deals with *post-employment* activities in furtherance of an interest adverse to the Government.

As an example of the close integration of the sections, the second and sixth prohibitions are almost precisely parallel in their application to the intermittent Government employee and the recent former employee, reflecting the basic similarity of the two situations from the conflict-of-interest viewpoint.

The points in the total statutory scheme where it is important to supplement the statutes by regulation are clearly identified.

A few archaic statutory restraints superseded by the new Act would be repealed. Others of the existing statutes would be amended to exclude from their coverage all Executive Branch employees (i.e., those covered by the new Act).

Fourteen special exemptive provisions contained in present law for members of various advisory committees and persons holding other part-time posts would be repealed, as being unnecessary in the light of the realistic approach of the new Act to

the intermittent employee problem. (See Recommendation 6 below.)

Such a unified Act would be more enforceable and more rational in its application. It would, by its very drafting, remedy many of the fundamental shortcomings of the present law.

RECOMMENDATION 3

The restraints contained in the present statutes should be greatly expanded in their scope by making them applicable to essentially all matters in which the public deals with the modern Federal Government.

Six of the seven conflict-of-interest statutes on the books today have their roots in the problems of a century ago; they are directed primarily against corruption in the prosecution of claims against the Government and the process of letting contracts by the Government. Claim prosecution and, to a lesser degree, procurement procedures have, however, been brought largely under control by administrative devices other than the conflict-of-interest statutes. In their places have grown up other risks that the draftsmen of the present statutes did not foresee and provide for. The proposed Act strikes hard at those deficiencies.

The proposed Act would extend the conflict-of-interest restraints to every kind of transaction in which today's Government engages with the private segment of the economy. The term "transaction involving the Government" is broadly defined as "any proceeding, application, submission, request for a ruling or other determination, contract, claim, case or other such particular matter" which will be the subject of Government action. The effect of this broad definition in expanding the scope of the present restraints would be very great.

In this respect Recommendation 3 is consistent with one made by the Justice Department to Congress several years ago in response to a court decision holding that the present post-employment restraints apply only to assisting in the prosecution of

claims against the Government for money or property. In that case an application for a pre-merger clearance ruling from the Antitrust Division of the Justice Department was held not to be a "claim" within the scope of the statute.

The proposed Act would expand present offenses in other respects. To cite a few examples, present law forbids a governmental employee to transact business as an agent of the Government with any *"business entity"* in the pecuniary profits of which he is interested. The comparable rule in the proposed Act would apply not only to business transactions with business organizations, but to any kind of transaction with any kind of entity in which the employee has a substantial economic interest. Furthermore, unlike the present law, the statute specifies a number of specific situations where the employee is deemed to hold an economic interest, such as where that interest is in fact owned by his wife or child, or where he has an understanding as to future employment with a private person or firm.

RECOMMENDATION 4

Certain important restraints now covered in regulations or not at all should be included in the basic statutes, particularly restraints relating to receipt of gifts and coercive use of office.

Present law would be further strengthened by the addition of two important areas of conduct heretofore treated only in regulations or not at all.

The first would forbid an employee of the Government to receive a thing of economic value as a gift, gratuity or favor from anyone who the employee has reason to believe would not give the gift but for the employee's office or position with the Government. Furthermore, regular Government employees would be forbidden to receive gifts or favors from anyone who does business with or is regulated by his agency. Some room is left in the statute for limited exceptions to be provided for in regulations.

The second new offense would forbid a Government employee

to use his office or position with the Government in a manner intended to induce or coerce a person or company doing business with him to provide him with any thing of economic value.

RECOMMENDATION 5

The statutes should permit the retention by Government employees of certain security-oriented economic interests, such as continued participation in private pension plans.

Hallmarks of modern American society are the pension plan, the group insurance plan, and other kinds of security-oriented arrangements. They are the basis of long-range economic planning by millions of individuals and families. Under present conflict-of-interest laws—passed when no such plans existed—there is some doubt whether an employee of the Government may legally continue as a member of some plans maintained by his former employer, at least if contributions to the plan by the employer are regularly made which benefit the Government employee. This overhanging doubt presents a great deterrent to the prospective employee and creates a severe hardship for the non-career employee.

The proposed Act permits Government employees to continue their participation in certain private plans under some circumstances and with adequate safeguards. For example, it would permit a Government employee to remain a member of a pension, group insurance or other welfare plan maintained by his former private employer so long as the employer makes no contribution to the plan on behalf of the former employee who is in Government service. Similarly, a Government employee could continue to belong to certain of these plans even if the former employer does make contributions on his behalf, so long as the plans are qualified under the Internal Revenue Code and so long as the payments by the former employer continue for no longer than five years of Government service.

RECOMMENDATION 6

Wherever it is safe, proper and essential from the viewpoint of recruitment, the statutes should differentiate in treatment between regular employees and citizens who serve the Government only intermittently, for short periods, as advisers and consultants.

To an ever-increasing extent the Government is dependent for information and advice—for learning not only how to do it, but what to do—upon part-time, temporary, and intermittent personnel. These serve individually, or as members of committees, but that service is in addition to their regular private work as scientists, technicians, scholars, lawyers, businessmen and so on. Technically, they are, however brief their service, "employees" of the Government, and at present, all of the conflict-of-interest statutes apply to them. This fact has brought about both refusals to serve and conscious or unconscious ignoring of the statutes by those who do serve. It has also resulted in a welter of special statutory exemptions.

The proposed Act distinguishes, in a few key places where it is safe and proper, between rules for regular full-time Government employees and rules for what are defined as "intermittent employees." Under the proposed Act, an "intermittent employee" is anyone who, as of any particular date, has not performed services for the Government on more than 52 out of the immediately preceding 365 days. The 52-day limit could be increased to 130 days by Presidential order in a narrow class of cases.

For these intermittent employees, there are certain special rules under the proposed Act. For example, regular full-time employees are forbidden to assist private parties for pay in transactions involving the Government; intermittent employees, who have to earn a living in addition to their occasional Government work, are allowed to assist others for pay in such transactions, except in cases where the particular transaction is, or within two years has been, under the intermittent employee's official respon-

sibility or where he participated in the transaction personally and substantially on behalf of the Government.

Similarly, since intermittent employees, by definition, are employed by organizations in addition to the Government, they are not subject to the rule forbidding their Government pay to be supplemented from private sources in return for personal services. Finally, the rules as to receipt of gifts are somewhat different for the two classes of employees.

RECOMMENDATION 7

Regular, continuing and effective enforcement of the law and regulations should be assured by emphasizing administrative remedies, rather than the clumsy criminal penalties of present law.

The basic purpose of a system of conflict-of-interest restraints is to help maintain high ethical behavior in the Executive Branch of the Government. It is the judgment of this Committee that the flexible and multiple weapons of the modern administrative process are more fitted to that day-to-day task than the criminal law.

Because the present statutes rely on criminal sanctions, they are rarely enforced. They are, in many respects, too harsh for offenses they declare. Furthermore, enforcement by criminal law is difficult, expensive and time-consuming. Accordingly, the proposed Act relies for its sanctions, in the first instance, upon ordinary disciplinary procedures, including dismissal. These procedures are supplemented by civil remedies particularly apt for former employees dealing with the particular agency—such as bans against appearances before the agency and civil damage actions.

The proposed Act retains classical criminal penalties for the most flagrant violations: those committed "knowingly" or "purposely." The definitions of these terms are adopted from a draft Model Penal Code prepared by the American Law Institute.

RECOMMENDATION 8

The statutes should create the framework for active and effective administration of the system of conflict-of-interest restraints, headed up with clear responsibility in the President. The President should designate, pursuant to the proposed Act, an Administrator to assist him in this function.

One of the greatest deficiencies in the present statutes is their failure to recognize the importance of a continuing administrative structure to deal with the problem of conflict of interest. The proposed Act would specifically provide for such administrative machinery.

Clear overall responsibility would be placed upon the President "for the establishment of appropriate standards to protect against actual or potential conflicts of interest on the part of Government employees and for the administration and enforcement of this Act and the regulations and orders issued hereunder."

To assist the President in carrying out this responsibility, the Act calls for the designation by him, from within the Executive Office of the President, of an "Administrator." He would be answerable directly to the President. He is given a series of coordinating, consultative and advisory functions under the Act. He would work closely with the Department of Justice and agency heads or their designees, but his would be a small office, and in no sense charged with centralized operation or enforcement of conflict-of-interest restraints.

RECOMMENDATION 9

In addition to the statutes themselves, there should be a "second tier" of restraints, consisting of Presidential regulations amplifying the statutes, and a "third tier," consisting of agency regulations tailored to the needs of particular agencies. The responsibility for day-to-day enforcement of the statutes and regulations should rest upon agency heads.

The proposed Act contemplates the issuance by the President of a set of regulations extending, supplementing, implementing

and interpreting the provisions of the Act. The Act also visualizes another set of regulations at the next lower level—that of the agency heads. The Presidential regulations would take precedence over any regulations issued by agency heads.

Agency regulations would tend to follow the present pattern, namely, particularized rules adapted to the special risks of the particular agency. For example, some agencies may have special rules on use of confidential information available within the agency. Others may adopt special post-employment restraints which go beyond the statutory provision. This diversity and particularization is realistic and desirable.

RECOMMENDATION 10

At all levels of administration potential conflict-of-interest problems should be headed off by preventive action, such as, for example, orientation programs for all new employees to acquaint them with the applicable conflict-of-interest rules, and periodic reminders as to such rules.

Much can be done to fight the conflict-of-interests problem by preventive measures. Section 11 of the proposed statute makes several suggestions. New employees can be required to certify that they have read the conflict-of-interests rules and to report on their outside employment. In particular, an effective orientation program would be helpful. Agents and attorneys appearing before agencies can also be required to file an affidavit stating that they are not, by such appearance, violating any conflict-of-interest law.

RECOMMENDATION 11

There should be more effective prohibitions and penalties applicable to persons outside Government who induce or participate in conduct by Government employees in violation of the conflict-of-interest laws.

Not infrequently a Government employee is found in a conflict-of-interest situation and penalized for it while the person responsible for placing him in the situation remains unscathed.

The proposed Act contains a new and broad section making it a violation for a person to make a payment (or transfer any other thing of economic value) to a Government employee while "believing or having reason to believe that there exist circumstances making the receipt thereof a violation of" certain sections of the Act. This prohibition also covers the making of gifts in the situations corresponding to the situations in which an employee may not receive a gift.

Both administrative and criminal sanctions are applicable to these violations by persons dealing with Government employees.

RECOMMENDATION 12

Each committee of the Senate considering a Presidential nominee for confirmation should be given the benefit of a full analysis, prepared by the Administrator in consultation with the Department of Justice, of any conflict-of-interest problems the nominee's particular situation may present. The confirming committee should give due consideration to this analysis and to the protections afforded by a modern and effectively administered overall scheme of conflict-of-interest restraints, if one is put into effect.

There is substantial evidence that the Government's efforts to recruit top-level executives have been impeded by the requirements of stock divestment imposed by the Armed Services Committee of the Senate.

This problem cannot be dealt with by statute. The confirmation power is a constitutional prerogative. However, this problem should be a subject of joint concern and increased cooperation between the Executive Branch and the Senate. There is some evidence that recently the Executive Departments have taken more pains to prepare their nominees for confirmation. Legal opinions have on occasion been furnished by the Justice Department; plans have been worked out in advance of hearings as to what need be sold and what could be kept, and representatives

of the appointing department or agency confer in advance of hearing with appropriate authorities of the Committee.

If the proposed Act were passed, the "Administrator" would become the central repository for all information concerning conflict-of-interest, and he would be expected to assist the Executive Branch in working out regular procedures for preparing nominees for confirmation. He could, in cooperation with the Department of Justice and general counsel to the agency in question, prepare a full analysis of the conflict-of-interest problems of the particular nominee. Over a period of time, these analyses might be given substantial weight by the confirming committees.

Furthermore, if a modern and effective system of statutory restraints is adopted by Congress and implemented by active Executive Branch administration, the confirming committees might be willing to place greater reliance on the statutory rules and procedures. One clear example is the procedure for disqualification recognized by the proposed Act where a Government official holds a particular economic interest in a private entity.

RECOMMENDATION 13

The Congress should initiate a thorough study of the conflict-of-interest problems of members of Congress and employees of the Legislative Branch of the Federal Government.

Primarily because of their representative function, members of Congress and Legislative Branch employees are, in matters of conflict of interests, in a significantly different position from that of Executive Branch employees. As such, Congress must be considered separately.

A fresh examination of these problems by Congress, or by a group initiated by Congress, is needed. However, such a study should in no way deter immediate action with respect to the Executive Branch along the lines of the proposed Act.

Committee Report

COMMITTEE ON PROFESSIONAL ETHICS

OPINION NO. 845

Question: CD, a members of the New York bar, has become associated with AB of the Washington, D.C. bar, who practices law in Brussels. The purpose of establishing a law office in Brussels is to be in a position to advise U.S. business firms and lawyers on the legal matters involved in establishing branches, subsidiaries or licensees, or investing in the Common Market area. Local counsel will be retained whenever necessary or desirable. In addition, AB and CD hope to advise U.S. citizens living abroad and others on U.S. tax problems, other problems of federal law, and CD would advise on New York law.

CD has requested our views as to the propriety of:

1. An announcement reading:

AB
takes pleasure in announcing
the establishment of law offices
at
Avenue ————
Brussels, Belgium

AB
District of Columbia Bar

CD
New York Bar

EF
Docteur en Droit

2. A letterhead in the following form:

Law Offices
AB
Avenue ————
Brussels

AB
District of Columbia Bar

CD
New York Bar

EF
Docteur en Droit

3. Calling cards in the following form:

CD

Consulting Attorney

Avenue ————

Tel. 1–2345 Brussels

Opinion: The inquiry does not state but we have assumed that neither AB nor CD is entitled to appear in or practice before the courts of Belgium. We are not advised and we express no opinion as to the import to be attributed to the phrase "Docteur en Droit" (Doctor of Law) associated with the name of EF. We assume merely that no misrepresentation or touting as to the status or privileges of EF is intended or is inherent in this designation.

We have also assumed that the activities of all three associates conform with the provisions of the appropriate laws in Belgium, as well as the proprieties of the Belgian counterpart of our Bar.

If our assumptions are correct, we are of the view that CD's employment by AB in Brussels for the purposes stated would not be professionally improper in so far as concerns our Canons of Professional Ethics.

We believe, however, that the proposed announcement of the establishment of "Law Offices" in Belgium, as well as the proposed letterhead to the extent that it designates the Brussels establishment as "Law Offices" are misleading and, hence, improper. While the activities proposed for AB and CD (which we assume may be performed lawfully in Belgium) involve matters which, if performed here, would constitute the practice of law within the meaning of Section 270 of the Penal Law, they fall far short of what is normally comprehended as comprising the activities of a "Law office."

Canon 33 states in part:

> " * * * In the formation of partnerships and the use of partnership names, care should be taken not to violate any law, custom or rule of court normally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the state, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. * * * "

We recognize that Canon 33 is not directly applicable to the inquiry since the arrangements between Messrs. AB, CD and EF apparently do not comprehend a partnership. Underlying Canon 33, however, is a direct admonition against statements or representations by lawyers not admitted in the jurisdiction wherein they maintain offices which would create or tend to create false impressions as to their professional position or privileges. In the circumstances, it is our view that the reference to "Law Offices" in the proposed announcement and on the proposed letterhead would create or tend to create a false and misleading impression as to the professional position and privileges enjoyed by Messrs. AB and CD in connection with their proposed Brussels establishment, and hence would be improper. We believe

that the same objection applies with respect to the designation of "Consulting Attorney" on the proposed calling card.

On the basis of our assumptions stated above, we see nothing improper in Messrs. AB and CD announcing the opening of "Offices" in Belgium. Nor would we regard it as improper in the circumstances stated if such announcement as well as the office letterheads indicate that AB is a member of the bar of the District of Columbia and CD a member of the bar of the State of New York, notwithstanding our view that in announcements and letterheads indicating an association between lawyers practicing in New York and lawyers not locally admitted, the spirit and intent of Canon 27 make it preferable to identify the lawyer or lawyers not locally admitted by the legend "Not Admitted in New York" rather than to state that such a lawyer is a "Member of the Bar of State X." We adhere to these views but recognize that in the case of lawyers with offices abroad, the suggested references to the jurisdictions wherein AB and CD are admitted are reasonable.

Nothing herein contained should be construed as an expression of an opinion on issues involving unauthorized practice of law.

March 7, 1960

The Library

THE PRESIDENTS OF THIS ASSOCIATION 1927–1945*

CHARLES EVANS HUGHES

1862–1948

1884 Admitted to the Bar
1907–10 Governor, New York
1910–16 Associate Justice, United States Supreme Court
1916 Republican candidate for President of the United States
1917–18 President, New York State Bar Association
President, Legal Aid Society, New York
1919–20 President, New York County Lawyers Association
1921–25 Secretary of State, Cabinets of Presidents Harding and Coolidge
1921 Commissioner Plenipotentiary for United States, International Conference on Limitation of Armaments
1924–25 President, American Bar Association
1925–29 President, American Society of International Law
1926–30 Member, Permanent Court of Arbitration, The Hague
1927–29 President, The Association of the Bar of the City of New York
1928 Chairman, United States delegation to 6th Pan-American Conference
1928–29 United States delegation, Pan-American Conference on Arbitration and Conciliation
1928–30 Elected Judge, Permanent Court of International Justice
1930–41 Chief Justice, United States Supreme Court
1932 President, Guatemala-Honduras Arbitral Tribunal

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CHARLES C. BURLINGHAM

1858–1959

1881 Admitted to the Bar

1929–31 President, The Association of the Bar of the City of New York

WRITINGS AND ADDRESSES

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JOHN W. DAVIS

1873–1955

1895 Admitted to the Bar
1899 Member, W. Va. House of Delegates
1906 President, W. Va. Bar Association
1911–13 Elected to 62d and 63d Congresses, 1st W. Va. District
1913–18 Solicitor General, United States
1918–21 Ambassador Extraordinary and Plenipotentiary to Great Britain
1922 President, American Bar Association
1924 Democratic candidate for President of the United States
1931–32 President, The Association of the Bar of the City of New York

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THOMAS D. THACHER

1881–1950

1906 Admitted to the Bar
1907–08 Asst. United States Attorney, Southern District of New York
1925–30 Judge, United States District Court, Southern District of New York
1930–33 Solicitor General, United States
1933–35 President, The Association of the Bar of the City of New York
1943 Corporation Counsel, City of New York
1943–48 Judge, New York State Court of Appeals

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CLARENCE J. SHEARN

1869–1953

1893 Admitted to the Bar
1915–18 Justice, New York Supreme Court, First District
1918–19 Justice, Appellate Division of Supreme Court, First Department
1935–37 President, The Association of the Bar of the City of New York

WRITINGS AND ADDRESSES

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HENRY L. STIMSON

1867–1950

1891 Admitted to the Bar
1906–09 United States Attorney, Southern District of New York
1910 Unsuccessful Republican Candidate for Governor, State of New York
1911–13 Secretary of War, Cabinet of President Taft
1927 Special Representative of the President to Nicaragua
1927–29 Governor General, Philippine Islands
1929–33 Secretary of State, Cabinet of President Hoover
1937–39 President, The Association of the Bar of the City of New York
1940–45 Secretary of War, Cabinet of President Roosevelt

WRITINGS AND ADDRESSES

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SAMUEL SEABURY

1873–1958

1894 Admitted to the Bar
1901 Elected Justice, City Court, New York City
1906 Elected Justice, New York Supreme Court
1914 Elected Associate Judge, New York Court of Appeals
1925–27 President, New York County Lawyers Association
1931 Designated Counsel to Joint Legislative Com. to Investigate Affairs of New York City

1932–34 President, New York State Bar Association
1937–50 President, New York Law Institute
1939–41 President, The Association of the Bar of the City of New York

WRITINGS

Address. 1934. 57 N.Y.S.B.A. Rep. 196–205.
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WILLIAM D. MITCHELL

1874–1955

1896 Admitted to the Minnesota Bar
1914–15 President, Ramsey County (Minn.) Bar Association
1925–29 Solicitor General, United States
1929–33 Attorney General, United States
1941–43 President, The Association of the Bar of the City of New York

WRITINGS AND ADDRESSES

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Watts, Edward Everett, Jr. Memorial of William De Witt Mitchell. 1956. Memorial Book 67–74.

ALLEN WARDWELL

1873–1953

1898 Admitted to the Bar
1926–36 President, Legal Aid Society
1943–45 President, The Association of the Bar of the City of New York

WRITINGS AND ADDRESSES

Legal aid societies. 1927. 50 N.Y.S.B.A. Rep. 134–43.
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